

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART IA PART 16

Index Number : 106213/2011

HERNANDEZ, SERGIO

vs

OFFICE OF THE MAYOR

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ *Article 78 proceeding*
is determined in accordance with the
accompanying memorandum decision.

FILED
DEC - 6 2011
NEW YORK
COUNTY CLERK'S OFFICE

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NOV 28 2011
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: **NOV 23 2011**

Alice Schlesinger
ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application of
SERGIO HERNANDEZ,

Petitioner,

Index No. 106213/11
Motion Sequence 001

For a Judgment Under Article 78
of the Civil Practice Law and Rules,

-against-

OFFICE OF THE MAYOR OF THE CITY OF
NEW YORK,

Respondent.
-----X

SCHLESINGER, J.:

This Article 78 proceeding involves the rights of the press and the public to receive information regarding decisions made by our Mayor to fill high-level positions in the New York City government. The case is of particular note in that it involves the controversial hiring of Ms. Cathleen Black to serve as New York City Schools Chancellor, a position she obtained only with a waiver of the credentialing requirements and a position she held for only a brief period of time. It is also noteworthy in light of the ongoing investigation by the New York City Public Advocate Bill de Blasio into why the City reportedly "fails so miserably to release even the most routine data requested under the state's Freedom of Information Law."¹

Background Facts

Petitioner Sergio Hernandez is a freelance journalist who currently reports for ProPublica in New York City. At the time of the events at issue here, Mr. Hernandez was reporting for The Village Voice and contributing to its blog "Runnin' Scared."

¹ See The New York Times Editorial "They Like Transparency, Until They Don't," November 14, 2011.

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By e-mail dated November 19, 2010 addressed to "A. Crowell" at City Hall, Mr. Hernandez made a request for documents pursuant to the New York State Freedom of Information Law (FOIL), codified at §84 *et seq.* of the New York State Public Officers Law (POL) (Petition, Exh A). In the e-mail, Mr. Hernandez identified himself as a reporter affiliated with the Village Voice and indicated that he was making the request "as part of a news-gathering effort and not for commercial use." He then requested copies of the following materials:

- E-mail messages sent from or received by any state electronic mail accounts assigned to the Office of the Mayor to or from an individual named Cathleen Prunty "Cathie" Black or e-mail addresses containing the domain hearst.com.

Mr. Hernandez emphasized that time was of the essence, and he urged City Hall to promptly provide whatever records were "available immediately," with others to follow as they were located. He also reminded the City that it was required to justify any denials or deletions "by reference to specific exemptions of the Law."

Despite the stated urgency of the November 19 request, the apparent newsworthiness of the subject, and at least two follow-up requests from Mr. Hernandez, the Mayor's Office did not respond for approximately 60 days. That response was in the form of a letter dated January 13, 2011 from Anthony W. Crowell, Counselor to the Mayor, mailed to Mr. Hernandez (Exh B). In the letter, Mr. Crowell denied the FOIL request in its entirety, stating that:

Please be advised that we are withholding responsive documents pursuant to Public Officers Law Section 87(2)(b), which allows agencies to withhold information that "if disclosed would constitute an unwarranted invasion of personal privacy;" and Public Officers Law Section 87(2)(g), which allows agencies to withhold "inter-agency and intra-agency materials."

In accordance with the instructions included at the end of Mr. Crowell's letter, Mr. Hernandez immediately filed an appeal by e-mail dated January 19, 2011 addressed to Deputy Mayor Carol Robles-Roman, with a copy to Mr. Crowell (Exh C). After recounting the details of his request and the procedural history, Mr. Hernandez argued why the City's denial was "in error" and contrary to the legislative policy favoring open government. First arguing generally why disclosure was justified, Mr. Hernandez stated as follows:

It should be emphasized that prior to January 3, 2011, Ms. Black was a private citizen employed by Hearst Corporation, a privately-held media conglomerate based in New York City. Since at least June 22, 2009, Hearst Corporation has owned and controlled the Internet domain name "hearst.com" and e-mail accounts associated with that domain. Because the initial request was filed before Ms. Black came under the city's employ, and because FOIL applies only to records that exist when the request is made, Ms. Black was still a private citizen within the scope and purpose of this request.

Mr. Hernandez then went on to argue with specificity why the two claimed exemptions were inapplicable. With regard to the first claimed exemption based on purported "unwarranted invasion of privacy," he asserted (with a relevant citation to *Gould v New York City Police Department*, 89 NY2d 267, 275) that "blanket exemptions for particular types of documents" were barred and that the law required the City to disclose the documents with appropriate redactions. With regard to the second claimed exemption based on documents exchanged between agencies or within an agency, he asserted (with a relevant citation to POL §86, subd. 3) that communications between the City and a private citizen such as Ms. Black or the Hearst Corporation did not qualify as either inter-agency or intra-agency materials.

Ms. Robles-Roman, Deputy Mayor for Legal Affairs, denied the appeal by letter dated January 26, 2011 (Exh D). Without addressing any of the arguments made by Mr. Hernandez, Ms. Robles-Roman simply stated that she had "determined that Mr. Crowell properly withheld these documents" pursuant to the exemptions stated in his letter. She concluded by advising Mr. Hernandez of his right to challenge the determination via an Article 78 proceeding. That is the proceeding before this Court now.

Discussion

The purpose of the Freedom of Information Law is to "promote open government and public accountability" with the law imposing "a broad duty on government to make its records available to the public." *Tuck-It-Away Associates, L.P. v Empire State Development Corp.*, 54 AD3d 154, 162 (1st Dep't 2008), *aff'd* 13 NY2d 882, *quoting Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 (1996). Not only is this principle firmly entrenched in our judicial opinions, but the Legislature articulated it clearly and unequivocally when promulgating the statute, firmly declaring at Public Officers Law §84 as follows:

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government. ...

The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article.

Consistent with this policy, the courts have routinely construed FOIL to mean that all documents are "presumptively available for review" unless they fall under one of the limited exemptions set forth in POL §87(2). See, *Tuck-It-Away, supra*, citing *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75 (1984).

Further, the burden is on the government to establish that the requested material "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers Div of Hearst Corp. v Burns*, 67 NY2d 562, 566 (1986).

The City in this case has wholly failed to apply either the policy declared by our Legislature or the dictates of our Court of Appeals detailed above. The conclusory, blanket denials do not satisfy the standard set by the law. What is more, a review of the two claimed exemptions reveals that neither one applies.

A claimed "unwarranted invasion of personal privacy" does not permit the wholesale withholding of a document. Rather, POL §89(2), specifies a list of identifying details that the agency may redact when it makes records available. While the City may redact "employment history", the e-mails presumably do not contain any confidences regarding that issue. Quite the contrary, Ms. Black's employment history was a matter of public record at the time of her appointment due to the need for a waiver of certain of the credentialing requirements. The privacy exemption is intended to apply to information of a genuinely private nature only, [see, *New York Committee for Occupational Safety and v Bloomberg*, 72 AD3d 153, 160 (1st Dep't 2010)], and the City has given no indication that the requested e-mails contain any such information.

What is more, a balancing of the potential privacy interests at stake against the public interest in disclosure favors disclosure in this case with appropriate redactions. Particularly instructive here is the First Department's decision in *Kwasnik v City of New York*, 262 AD2d 171 (1st Dep't 1999). There the Appellate Division affirmed the trial court's direction to the City University of New York to disclose the public employment history of certain employees who purportedly did not meet the licensing requirement for employment when hired. The court stated: This result is supported by opinions of the Committee on Open Government, to which the courts should defer ..., favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record " 262 AD2d at 172 (citations omitted). In applying the balancing test to the circumstances of the case, the court concluded that "the agency's need for information would be great and the personal hardship of disclosure small (see, Public Officers Law §[2][b][iv])." *Id.*

Such is the case here. As Ms. Black did not meet the credentialing requirements for the all-important position of School Chancellor, the public has the right to know what information about her employment history and qualifications was disclosed in the e-mails. Any information of an intensely personal nature could easily be redacted, with the balance of the information disclosed. Indeed, despite its earlier blanket denial of the FOIL request on privacy grounds, the City's position in this litigation appears to be that while telephone numbers, cell phone numbers, and personal e-mail addresses should be redacted, the remaining text of the e-mails is not exempt from disclosure on privacy grounds. As petitioner does not dispute that such redactions are appropriate, they will be allowed by this Court.

The City's second claimed exemption relating to inter-agency or intra-agency records is particularly specious, as it by definition involves communications between or within governmental agencies. POL §86(3). It is undisputed that Ms. Black and the Hearst employees were private citizens at the time the subject e-mails were written. Simply put, the statute offers no exemption for agency communications with private citizens such as Ms. Black. Records that consist of communications with people outside the agency must be disclosed. See, *Miller v NY State Dept. of Trans.*, 58 AD3d 981, 984-85 (3rd Dept 2009)(DOT's press releases and communications with people outside the agency were not exempt as intra-agency documents).

Wholly devoid of merit is the City's claim that Cathleen Black and her staff were agents of the City during the relevant time. The City argues that because the City had an interest in addressing concerns by Commissioner Steiner about Ms. Black's qualifications for the position of Chancellor, and because Ms. Black was providing information to assist the Mayor in addressing those concerns, Ms. Black and her staff were acting as *de facto* "agents" or as "consultants" for the City.

Neither the facts nor the law on agency support this argument. As petitioner correctly notes, as a mayoral nominee Ms. Black was not bound to act on the Mayor's behalf, and the Mayor had no basis to exert control over Ms. Black before her appointment was confirmed. While Ms. Black may well have followed the Mayor's guidance in order to assist her in receiving the appointment they both desired, and while the interests of both parties may well have been served by obtaining the information needed to address Commissioner Steiner's concerns, those facts do not constitute a principal-agent or consultant relationship.

What is more, applying the exemption in a case such as this would not serve the policy behind the exemption. The obvious purpose of the exemption is to encourage "people within an agency to exchange opinions, advice and criticism freely and frankly, without the chilling prospect of public disclosure." *Matter of New York Times Co. v City of NY Fire Dept.* 4 NY2d 267, 176 (1996) However, communications with people outside the agency are not considered part of the government's deliberative process, and their disclosure will not inhibit decision-making within the government. See *Miller, supra*.

Here, the e-mails presumably do not relate to the State Education Department's actual deliberative process in deciding whether to grant Ms. Black the requested waiver. Instead, they involve efforts by the City to obtain information to prepare the waiver request, complete the mayoral appointment process, and address community concerns about Ms. Black's qualifications for the position. Ms. Black was the appointee, and not a consultant, in that process. Thus, no basis for the exemption exists.

Regarding petitioner's request for attorney's fees, based on the papers submitted to date and oral argument, the Court finds that the interests of all parties would be served by a conference to further address the issues raised.

Accordingly, it is hereby

ADJUDGED that the petition is granted and respondent is directed to release the subject records consistent with the terms of this decision within fifteen days of the date of this decision; and it is further

ORDERED that counsel for both parties shall appear before this Court in Room 222 on Wednesday, January 4, 2012 at 9:30 a.m. to further address the issue of counsel fees.

Dated: **NOV 23 2011**

Alice Schlesinger
J.S.C.
ALICE SCHLESINGER

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CLERK

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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK
In the Matter of the Application of SERGIO HERNANDEZ, Petitioner, For a Judgment Under Article 78 of the Civil Practice Law and Rules, -against- OFFICE OF THE MAYOR OF THE CITY OF NEW YORK, Respondent.
ORDER AND JUDGMENT
<i>MICHAEL A. CARDOZO</i> <i>Corporation Counsel of the City of New York</i> <i>Attorney for Respondent</i> <i>100 Church Street</i> <i>New York, N.Y. 10007</i> <i>Of Counsel Jeff Dantowitz</i> <i>(212) 788-0939</i>
<i>Due and timely service is hereby admitted.</i> <i>New York, N.Y.</i>, 2011 <i>Esq.</i> <i>Attorney for</i>

FILED

DEC -6 2011

AT 12:55 P M
N.Y., CO. CLK'S OFFICE